TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 238.

THE UNITED STATES, APPELLANT,

vs.

BERNARD EMHOLT AND ELIZA BERGENER, CLAIMANTS, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED SEPTEMBER 5, 1879.

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a UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the western district of Wisconsin, begun and held, according to law, at the city of Madison, in said district, on the first Monday (being the second day) of June, A. D. 1879.

Present and presiding the honorable John M. Harlan, associate justice of the Supreme Court of the United States, and the honorable Romanzo Bunn, district judge.

On the thirty-third day of said term, to wit, on the twenty-fifth day of July, A. D. 1879, the following among other proceedings were had, to wit:

BERNARD EMHOLT AND ELIZA BERGENER, claimants, &c.,
vs.
UNITED STATES OF AMERICA.

Be it remembered that heretofore, to wit, on the 25th day of July, A. D. 1879, the following transcript of record was received and filed from the district court of the United States for the western district of Wisconsin:

TRANSCRIPT OF RECORD.

1 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the western district of Wisconsin, begun and held, according to law, at the United States court-room in the city of Madison, in said district, on the first Monday (being the second day) of June, A. D. 1879.

Present and presiding the honorable Romanzo Bunn, judge.

And on the thirty-third day of said term, to wit, on the twenty-fifth day of July, A. D. 1879, the following among other proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
TWENTY-FIVE POUNDS OF HOPS AND OTHER PROPERTY. } Information in rem.

Be it remembered that heretofore, to wit, on the twentieth day of January, A. D. 1879, came H. M. Lewis, district attorney of the United States for the western district of Wisconsin, and filed herein an information in the words and figures following, to wit:

Information.

District court of the United States for the western district of Wisconsin.

On the twentieth day of January, in the year of our Lord one
2 thousand eight hundred and seventy-nine, comes H. M. Lewis, as the attorney of the United States of America for said western district of Wisconsin, and in the name and on behalf of the said United

States of America, in a case of seizure on land under the internal-revenue laws of the United States, informs the court:

That Francis Campbell, deputy collector of internal revenue for the second collection district of the State of Wisconsin, heretofore, to wit, on the sixteenth day of January, in the year of our Lord one thousand eight hundred and seventy-nine, on land, at the town of Shullsburg, in the county of La Fayette, within the western district of Wisconsin, and within the jurisdiction of said court, did seize the following-described property, consisting of goods, wares, merchandise, distilled spirits, liquors, stills, boilers, apparatus, commodities, utensils, vessels, barrels, casks, packages, tools, implements, raw materials, personal property, and real estate; that is to say, real estate situate in said county of La Fayette, and described as follows, to wit: Commencing at the southeast corner of *of* the northeast quarter of the southwest quarter of section No. three (3), in town. No. one (1) north, of range number two (2) east of the fourth principal meridian, running thence north $9\frac{50}{100}$ chains, thence west $3\frac{063}{100}$ chains, thence south $9\frac{50}{100}$ chains, thence east $3\frac{063}{100}$ chains, to the place of beginning, containing three acres of land; magnetic variation 8° 30′ east; and the stone brewery, and the additions and sheds and buildings appurtenant to said stone brewery, and the barn and dwelling-house and corn-crib

3 situate on said premises, and all other buildings thereon and appurtenant thereto; and also the following personal property, to wit:

Twenty-five pounds of hops, one copper still-head and worm, two hundred bushels of barley, fifty bushels of malt, three hundred bushels of corn on the cob, fifty bushels of oats, fifty-six ⅛-barrel beer-stamps, one hundred and eighty-eight and ⅛ barrels of beer, ten gallons of distilled spirits, five beer-tubs, one mash-tub, eighty beer-kegs (one-fourth barrel capacity), thirty-five beer-kegs (one-eighth barrel capacity), twenty beer-casks (capacity fifteen barrels), ten beer-casks (eight barrels capacity), one patent beer-cooler, one beer-pump, one rotary pump, one hundred feet rubber hose, five brass faucets, two bay mules (one seventeen years old, the other eight years old), three bay horses (one blind), two bob-sleighs, two wagons, two setts double harness, one malt-mill and power, and three cows, said to belong to Severin Schulte and Peter Lauderbach, and now has the same in his custody within said western district of Wisconsin, as forfeited to the United States for the following causes:

1st. That prior to said seizure taxes were imposed by the provisions of law upon the said distilled spirits, and the same, being so subject to the payment of taxes as aforesaid, were found by the said Francis Campbell, deputy collector as aforesaid, in the possession and custody and within the control of Severin Schulte and Peter Lauderbach, and a person or persons to the said attorney unknown, for the purpose of being sold and removed by said Severin Schulte and Peter Lauderbach, and such person or persons, in fraud of the internal-revenue laws, and with design to avoid payment of said taxes, against the 3453d section of the Revised Statutes of the United States.

4 2nd. That the said barley, malt, corn, and oats then and there, being articles of raw material, were found in the possession of Severin Schulte and Peter Lauderbach, and such other person and persons, then and there intending to manufacture the same into articles of a kind subject to tax, to wit, into distilled spirits, for the purpose of fraudulently selling such manufactured articles, and with design to evade the payment of said tax, against the 3453d section before mentioned.

3d. That said tools, implements, instruments, and personal property were found in the place or building, and within certain yards and inclosures, where said distilled spirits and said raw materials were found as aforesaid, whereby they became liable to forfeiture by the provisions of said 3453d section aforesaid.

4th. That said still and distilling apparatus then and there, being set up in the stone brewery on the premises hereinbefore described, were in the possession and custody and under the control of Severin Schulte and Peter Lauderbach, and a person or persons to said attorney unknown, which said Severin Schulte and Peter Lauderbach, and said person or persons, did refuse and neglect to register said still and apparatus with the collector of the district in which the same were, as required by the provisions of the 3258th section of the said Revised Statutes, and that the said personal property was then and there in the possession and custody and under the control of said Severin Schulte and Peter Lauderbach, and said person or persons un-
5 known, and was found in the buildings in which said still and apparatus was set up, and in the yard and inclosure connected therewith, against the provision of said 3258th section.

5th. That said distillery and distilling apparatus, and the real estate and premises connected therewith as aforesaid, were used and occupied by Severin Schulte and Peter Lauderbach, then and there doing the business of distillers, which Severin Schulte and Peter Lauderbach did fail and refuse to give the bond required by the provisions of the 3260th section of the said Revised Statutes, conditioned upon the faithful compliance with all the provisions of law in relation to the duties and business of distillers, and upon the payment of all penalties incurred and fines imposed upon him for violation of said provisions, and upon his not suffering the lot or tract of land on which said distillery stood, or any part thereof, or any of the distillery apparatus, to be incumbered by mortgage, judgment, or other lien during the time in which he should carry on said business.

6th. That said Severin Schulte and Peter Lauderbach made and distilled distilled spirits at the said distillery, and owned said distillery, distillery apparatus, and the said lot and tract *and tract* of land on which said distillery stood, and the said personal property, stills, boilers, and other vessels used for the purpose of distilling spirits, and had the same under their superintendence as agents or owners, and used such distillery, distillery apparatus, personal property, stills, boilers, and other vessels, which said Severin Schulte and Peter Lauderbach neglected and refused to make and cause to be made, from day to day, in a book and books kept by them in form prescribed by the Commissioner
6 of Internal Revenue, true and exact entries of the kinds of materials, and of the quantity, in pounds, bushels, and gallons, purchased by them for the production of spirits, and of the person or persons from whom purchased, and by what conveyance delivered at said distillery, and of the amount paid therefor, and of the kind and quantity of feed purchased for the said distillery, and of whom purchased, and of the amount paid for ice and water, and of the repairs placed on said distillery and distilling apparatus, and of the cost thereof, and by whom and when made, and of the name and residence of each person employed in and about said distillery, and in what capacity they were employed; and that said Severin Schulte and Peter Lauderbach neglected and refused to make true and exact entries from day to day in a book or books of the quantity of grain and other material used for the production of spirits, and of the time of day when yeast and other com-

positions were put into mash and beer for the purpose of exciting fer
mentation, and of the quantity of mash in each tub, and of the gravity
and temperature of the beer at the time of yeasting, and of its quantity,
gravity, and temperature on every day thereafter at the hour of meridian,
and of the time when the fermenting tubs and each of them were
emptied of ripe mash and beer, and of the number of gallons of spirits
distilled, and of the number of gallons placed in warehouse and of the
proof thereof, and of the number of gallons sold and removed, with
proof thereof, and of the name, place of residence, and residence of the
person or persons to whom said spirits were sold; and that said
7 Severin Schulte and Peter Lauderbach did make false entries in
said books in each and all the foregoing particulars, and did
omit entries therefrom, with intent to defraud and to conceal from the
revenue officers certain facts and particulars herein referred to re-
quired to be stated and entered in said books, and to mislead in refer-
ence thereto, against the 3303d, 3304th, and 3305th sections of said Re-
vised Statutes.

7th. That the said distilled spirits, and the said stills and other
apparatus, the said still and apparatus then and there, to wit, at
the said town of Shullsburg, in the county of La Fayette, in the
western district of Wisconsin, on the sixteenth day of January,
in the year of our Lord one thousand eight hundred and seventy-
nine, being fit and intended to be used for the distillation of spirits,
were owned by said Severin Schulte and Peter Lauderbach, who
then and there carried on the business of distillers, wholesale li-
quor-dealers, retail dealers in liquors, and rectifyers without having
paid the special taxes required by law, and carried on the business of
distillers without having given bond as required by law, and engaged
in and carried on the business of a distiller with the intent to defraud
the United States of the tax on the spirits distilled by them; and that
said distilled spirits and personal property were found in the said distil-
lery of the said Severin Schulte and Peter Lauderbach, and in a certain
building, room, yard, and inclosure connected therewith, and used
with and constituting a part of the said distillery premises; and that
said distillery is situated on said lot and tract of land herein-
8 before described; and that the said Severin Schulte and
Peter Lauderbach, and a certain person or persons to said at-
torney unknown, have a certain right, title, and interest therein,
and that said person or persons, then and there having certain
right, title, and interest in said lot and tract of land, did then and
there knowingly suffer and permit the said business of a distiller to
be there carried on, and did connive at the same, and that said per-
sonal property was then and there owned by and in the possession of
said Severin Schulte and Peter Lauderbach, who then and there per-
mitted and suffered a certain building, yard, and enclosure, and a part
thereof, to be used for the purposes of ingress and egress to and from
said distillery, and which said personal property was found in said
building, yard, and enclosure; and that said Severin Schulte and Peter
Lauderbach, and said person and persons to said attorney unknown,
knowingly suffered and permitted said premises, to wit, said stone
brewery and the buildings and additions adjoining and appurtenant
thereto, and the said lot and tract of land hereinbefore particularly de-
scribed, to be used for ingress and egress to and from said distillery,
and then and there had certain rights, title, and interest in and to said
premises, against the 16th section of the act of Congress entitled "An
act to annul existing customs and internal-revenue laws, and for other
purposes," approved February 8th, 1875.

And the said attorney of the United States, on behalf of the United States, saith that all and singular the premises are true, and that by reason thereof, and by force of the statute in such case made
9 and provided, the aforementioned property as hereinbefore set forth and described became and is forfeited to the use of the United States, as in said statutes provided.

Wherefore he prays that the usual process and monition of this honorable court issue in this behalf, and that all persons interested in the said property may be cited and admonished in general and special to answer the premises, and, all due proceedings being had thereon, that, for the causes aforesaid, and others appearing, the said property as before set forth be condemned by the definite sentence and decree of this honorable court as forfeited to the use of the United States, according to the form of the statute of the United States in such case made and provided.

H. M. LEWIS,
United States Attorney for the Western District of Wisconsin.

Whereupon, on said twentieth day of January, A. D. 1879, a monition issued herein in the words and figures following, to wit:

Monition.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to the marshal of the western district of Wisconsin, greeting:

10 Whereas an information has been filed in the district court of the United States for the western district of Wisconsin, on the 20th day of January, in the year of our Lord one thousand eight hundred and seventy-nine, by H. M. Lewis, United States attorney for the western district of Wisconsin, against the following-described property, consisting of goods, wares, merchandise, distilled spirits, liquors, stills, boilers, apparatus, commodities, utensils, vessels, barrels, casks, packages, tools, implements, raw materials, personal property, and real estate; that is to say, real estate situate in the county of La Fayette and State of Wisconsin, and described as follows, to wit: Commencing at the southeast corner of the northeast quarter of the southwest quarter of section number three (3), in town. number one (1) north, of range number two (2) east of the fourth principal meridian, running thence north $9\frac{50}{100}$ chains, thence west $3\frac{06\frac{1}{2}}{100}$ chains, thence south $9\frac{50}{100}$ chains, thence east $3\frac{06\frac{1}{2}}{100}$ chains, to the place of beginning, containing three acres of land, magnegtic variation, 8° 30′ east; and the stone brewery, and the additions and sheds and buildings appurtenant to said stone brewery, and the barn and dwelling-house and corn-crib situate on said premises, and all other buildings thereon and appurtenant thereto; and also the following personal property, to wit: Twenty-five pounds of hops, one copper still-head and worm, two hundred bushels of barley, fifty bushels of malt, three hundred bushels of corn on the cob, fifty bushels of oats, fifty-six ½-barrel beer-stamps, one hundred and eighty-eight and ½-barrels of beer, ten gallons of distilled spirits, five beer-tubs, one mash-tub, eighty beer-kegs (one-fourth barrel capacity), thirty-five beer-kegs (one-eighth barrel capacity), twenty-four casks capacity
11 fifteen barrels), ten beer-casks (eight barrels capacity), one pat-

ent beer-cooler, one beer-pump, one rotary pump, one hundred feet rubber hose, five brass faucets, two bay mules (one seventeen years old, the other eight years old), three bay horses (one blind), two bob-sleighs, two wagons, two setts double harness, one malt-mill and power, and three cows, said to belong to Severin Schulte and Peter Lauderbach, and now has the same in his custody, within the western district of Wisconsin, for the reasons and causes in the said information mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said goods, wares, merchandise, distilled spirits, liquors, stills, boilers, apparatus, commodities, utensils, vessels, barrels, casks, packages, tools, implements, raw materials, personal property, and real estate may be cited, in general and special, to answer the premises; and, all proceedings being had, that the said goods, wares, merchandise, distilled spirits, liquors, stills, boilers, apparatus, commodities, utensils, vessels, barrels, casks, packages, tools, implements, raw materials, personal property, and real estate may, for the causes in said information mentioned, be condemned and sold to pay the demands of the United States of America.

You are therefore hereby commanded to attach the said goods, wares, merchandise, distilled spirits, liquors, stills, boilers, apparatus, commodities, utensils, vessels, barrels, casks, packages, tools, implements, raw materials, personal property, and real estate aforesaid, and to detain the same in your custody until the further order of the court
12 respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of said information, that they be and appear before said court, to be held in and for the western district of Wisconsin, on the first Monday of March, A. D. 1879, at Madison, at ten o'clock in the forenoon of said day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return of, together with this writ.

Witness the honorable Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, at the city of Madison, in said district, this 20th day of January, A. D. 1879, and of the Independence of the United States the one hundred and third.

[L. S.] F. M. STEWART, *Clerk.*

H. M. LEWIS,
U. S. District Attorney.

Upon which motion the said marshal made return as follows, to wit:

Return to monition.

In obedience to the within attachment and monition, I attached the property therein described on the 22nd day of January, instant, and have given due notice to all persons claiming the same that this court will, on the 3rd day of March, 1879, at ten o'clock in the forenoon, (if that day should be day of jurisdiction, if not on the next day
13 of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Madison, Wis., January 22, 1879.

F. W. OAKLEY, *U. S. M.*

And afterwards, to wit, on the third day of March, A. D. 1879, came Bernard Emholt, mortgagee and claimant, and filed his answer herein in words and figures as follows, viz:

Answer of Bernard Emholt.

District court of the United States, western district of Wisconsin.

UNITED STATES OF AMERICA
versus
TWENTY-FIVE POUNDS OF HOPS, &C.

The answer of Bernard Emholt, the mortgagee and claimant of the said real estate described as follows, viz: The undivided one-half interest of all that certain tract, piece or parcel of land and premises and appurtenances lying and being in the county of La Fayette and State of Wisconsin, and known, designated, and described as follows, to wit: Commencing at the southeast corner of the northeast quarter of the southwest quarter of section number three (3), in town number one (1) north, of range number two (2) east of the fourth principal meridian, running thence north 9 $\frac{59}{100}$ chains, thence west 3 $\frac{06\frac{1}{2}}{100}$ chains to the place of beginning, containing three acres of land, more or less, magnetic variation 8° 30′ east; and the stone brewery, and the additions and
14 sheds and buildings appurtenant to said stone brewery, and the barn and dwelling-house and corn-crib situate on said premises, and all other buildings thereon and appurtenant thereto; and the mortgagee and claimant of two cows, the mortgagee and claimant of the undivided one-half interest in and to one span of dark bay mules, two wagons, two setts double harness, two pairs bob-sleds, two hundred bushels of barley, fifty bushels of malt, and all the beer-barrels and beer-kegs of every name and nature, and all the beer tubs and casks, the mash-tub, one beer-pump, one rotary pump, one hundred feet rubber hose, one patent cooler five, brass faucets, and one malt-mill and power, and one hundred and eighty-eight and $\frac{1}{2}$ barrels of lager beer, the information filed herein in behalf of the United States, by Keyes and Chynoweth, his attorneys, respectfully shows to the court:

And now comes Bernard Emholt, claimant as aforesaid, by Keyes & Chynoweth, his attorneys, and for answer to the said information against the said property, both real and personal, says that the property above described, real and personal, in the information mentioned, did not, nor did any part thereof, become forfeited in manner & form as in the said information in that behalf alleged.

And this claimant, further answering said information, shows and alleges that heretofore, to wit, on the 12th day of August, A. D. 1867, at Shullsburg, La Fayette County, Wisconsin, the said Severin Schulte made, executed, and delivered to this claimant his certain promissory note in writing, whereby, for value received, the said Severin Schulte
15 promised to pay to the said claimant, four years from date, with interest at the rate of ten per cent. per annum, the sum of three thousand dollars; and to secure the payment of the said sum of three thousand dollars and interest mentioned in the said note the said Severin Schulte and Mary Schulte, his then wife, and since dead, did, at the same time, execute, under their hands and seals, and delivered to the said claimant, a mortgage bearing even date with the said note and conditioned for the payment of the sum and interest mentioned in the same as above set forth, by which mortgage the said mortgagors, they

then being the owners in fee of the premises described in the information herein, and the whole thereof, duly mortgaged the said premises in said information described, and the whole of the same, to this claimant, and which said mortgage was attested by two subscribing witnesses, and was duly acknowledged and was recorded in the office of the register of deeds of La Fayette County aforesaid, on the 12th day of February, A. D. 1869, at three o'clock p. m. of said day, in volume 12 of mortgages, on page 475, and which said mortgage was duly stamped with United States internal-revenue stamps of the total value of three dollars, said stamps numbering four, two of the same being of the denomination of fifty cents each and the other two being of the denomination of one dollar each, and said stamps and each and all of the same duly cancelled. The said principal sum mentioned in said mortgage has never been paid, neither has any part of the same been paid, except as hereinafter set forth; that the interest on the said principal sum was paid up to and including February 12th, A. D. 1875. That the said mortgage and the said note has never been paid or discharged or satisfied except as hereinafter specified. That on the 22d day of January, A. D. 1878, and
16 before the said mortgage above mentioned was hereinafter satisfied, as above mentioned, the said Severin Schulte, who was at said time last mentioned the owner in fee of only an undivided one-half interest in the said premises above described, and Rosalie Schulte, his then wife, as a renewal of the mortgage hereinbefore mentioned, and not otherwise, made, executed, and delivered to this claimant a mortgage on the undivided one-half interest of said premises, by which mortgage the said mortgagors mortgaged the undivided one-half interest of the said premises, which said mortgage last named was attested by two subscribing witnesses, and was duly acknowledged and duly recorded in office of the register of deeds of said La Fayette County, on the 28th day of January, A. D. 1878, at eleven and one-half o'clock a. m. of said day, in volume twenty-two of mortgages, on page two hundred and twenty-nine; that said mortgage last named was given in renewal of the said mortgage first named, and to secure the principal sum and interest mentioned in the note above specified, which said mortgage first mentioned was given to secure; that on said 22nd day of January, A. D. 1878, there was due and unpaid upon the said note, as principal and interest, the sum of something over thirty-eight hundred dollars, for twenty-eighty hundred dollars of said sum the said Schulte giving to this claimant his promissory note in writing, dated on that day, whereby, for value received, he promised to pay to this claimant, two years from date, with interest at the rate of ten per cent. per annum, to be paid annually, the said sum of twenty-eight hundred dollars,
17 and executed the said mortgage last named as aforesaid in renewal of the mortgage first above named, and to secure the payment of the said twenty-eight hundred dollars, a portion of the principal sum and interest due as aforesaid. That after the said note and mortgage last above mentioned were so executed and delivered to this claimant he satisfied the said mortgage first above mentioned, in writing, under his hand and seal, which said satisfaction was recorded in the office of the register of deeds for said La Fayette County, on the 28th day of January, A. D. 1878, at 11 and one-half o'clock of said day, in volume twenty-three of mortgages, on page 10. That the said mortgage last named now remains in full force and virtue, wholly unpaid, unsatisfied, and undischarged. That this claimant now owns and has continually owned since the said 22nd day of January, A. D. 1878, the said note and mortgage last above mentioned, and there is now unpaid,

due, and to become due upon the same the said sum of twenty-eight hundred dollars, and interest at the rate of ten per cent. from the said 22d day of January, A. D. 1878, to the time the same shall be paid, and the said mortgage is now a valid and subsisting lien upon the said undivided one-half of said premises, and prior to the lien or right of the Government of the United States to the same. That the said note and mortgage first above mentioned, from the day of its date to the time of its satisfaction by this claimant, and during the same time the said note first above mentioned belonged to this claimant, and the said mortgage first above mentioned was from the day of its date to the time of its satisfaction a good, valid, and subsisting lien in the amount due upon said note upon the said premises and upon the whole thereof prior to the lien and right of the government therein. That
18 during all of the times aforesaid, to the best of the knowledge, information, and belief of this claimant, the said premises were used only and solely as a brewery, and not otherwise. That this claimant never knew that they were used as a distillery, and never connived at their being so used; that he did not know at the time said mortgages were so executed as aforesaid or at any time that the said premises or any part thereof or of the same were to be used as a distillery or for distilling purposes, and at said times or any other time did this claimant have any reason to believe that the said premises or any part of the same were so to be used, and this claimant, at said times or any other time, did not know and had not any reason to believe that there was a still or distilling apparatus of any kind or nature or description upon the said premises; and that this claimant never gave his consent that the said premises should be used as a distillery, or that a still or any distilling apparatus should be brought upon said premises.

And this claimant further says that, on the 21st day of January, A. D. 1878, the said Severin Schulte, to secure to this claimant the balance of the sum due him upon the note and mortgage first above mentioned, to wit, the sum of one thousand dollars, executed to him a note for that sum, for value received, whereby he promised to pay to him, two years after date, the said sum of one thousand dollars, with interest at the rate of ten per cent. per annum, to be paid annually, and a chattel mortgage upon the said two cows, and the undivided one-half interest in and to the said span of bay mules, two wagons, two setts double harness, two pairs bob-sleds, two hundred bushels of barley,
19 fifty bushels of malt, and all the said beer-barrels and beer-kegs of every name and nature, and all the beer tubs and casks, the mash-tub, beer-pump, rotary pump, one hundred feet rubber hose, patent cooler, the five brass faucets, the malt-mill and power, and one hundred and eighty-eight and ½ barrels larger beer, described in the information herein in behalf of the United States, which said chattel mortgage was duly filed in the office of the town clerk of the town of Shullsburg, on the 22d day of January, A. D. 1878.

That the said mortgage ever since has been and is now a valid and subsisting lien upon the said personal property in the said sum of one thousand dollars, and interest at the rate of ten per cent. from the said 2nd day of January, A. D. 1878. That the said note last above named has not been paid, or any part thereof, and that this claimant is now the owner and holder of the said note and mortgage last above named. That the said personal property above described was not, neither was any of the same, used by the said Lauderbach and Schulte, or either of them, in violation of the revenue laws of the United States.

And this claimant further says that as to the allegations contained

in the information as to the violation of said sections 3258, 3260, 3303, 3304, 3305, and 3456, or either or any of them, or any law of the United States, by the said Lauderbach and Schulte, this claimant has not knowledge sufficient to form a belief, and therefore denies each and all of said allegations.

And this claimant further shows that he has never violated said sections, or any one of them, and that he has never known or connived at the violation of said sections, or any one of them, on the part of the said Lauderbach or Schulte, or either of them, never has knowingly suffered or permitted the business of a distiller to be carried on in the said premises, and never has connived at the same, and never knowingly suffered or permitted the said premises, the said stone brewery, or buildings or additions adjoining or appurtenant thereto, or the lot or tract of land hereinbefore particularly described, to be used for ingress or egress to or from said distillery.

And as to each and every other allegation, matter, and thing in said information contained, not hereinbefore specially admitted, answered, or denied, this claimant says he has not knowledge sufficient to form a belief, and therefore denies the same.

Wherefore claimant prays judgment that his interests in the said property and all of the same be protected by the decree herein. That if the court should decree herein a forfeiture, that the same be subject to the interest and claim of this claimant in the said property and the whole of the same, or that the said information be dismissed with costs.

Dated this 3rd day of March, A. D. 1879.

BERNARD EMHOLT,
Claimant,
By KEYES & CHYNOWETH,
Claimant's Attorneys, Madison, Wis.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Bernard Emholt, being first duly sworn, upon his oath deposes and says that he is the claimant herein; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

BERNARD EMHOLT.

Subscribed & sworn to before me this 3rd day of March, A. D. 1879.
[SEAL.] JOSEPH S. KEYES,
Notary Public, Dane Co., Wis.

And on the same day, to wit, on the 3rd day of March, A. D. 1879, said claimant filed his stipulation for costs as follows, to wit:

Stipulation for costs.

District court of the United States for the western district of Wisconsin.

UNITED STATES
vs.
TWENTY-FIVE POUNDS OF HOPS, &C.

Whereas an information was filed in this court on the twentieth day of January, A. D. 1879, by the district attorney of the United States, in

behalf of the said United States, against twenty-five pounds of hops, one copper still-head and worm, two hundred bushels of barley, fifty bushels of malt, three hundred bushels of corn on the cob, fifty bushels of oats, fifty-six ¼-barrel beer-stamps, &c., &c., &c., all particularly described in the information herein, for the reasons and causes in the said information mentioned, and praying that the same may be condemned and forfeited to the use of the United States, according to the statute in such case made and provided; and

Whereas an answer has been filed to the said information by
22 Bernard Emholt, mortgagee and claimant of the said property, and the said claimant and Willett S. Main, of Madison, Wisconsin, surety, the parties hereto, hereby consenting that in case of default or contumacy on the part of the claimant or his surety a summary decree may be entered against them, and each of them, and that execution thereon for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands:

Now, therefore, we, the undersigned, Bernard Emholt and Willett S. Main, as principal and surety, submitting ourselves to the jurisdiction of this court, do acknowledge ourselves to be bound unto the said United States, or whomsoever it may concern, the said Bernard Emholt as principal, and the said Willett S. Main as surety, jointly and severally, in the sum of two hundred and fifty dollars, lawful money of the United States, conditioned that if the claimant above named shall pay all costs and expenses which shall be awarded against him by the final decree of this court, or, upon an appeal, by an appellate court, then this bond shall be void; otherwise to remain in full force and effect.

BERNARD EMHOLT.
WILLETT S. MAIN.

Taken and acknowledged this 3d day of March, A. D. 1879, before me.
F. M. STEWART,
Clerk U. S. District Court.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Willett S. Main, being first duly sworn, deposes and says that he is a resident of the city of Madison, Dane County, Wisconsin; that
23 he is worth in property not exempt from execution, and over and above all just debts and liabilities, the sum of five hundred dollars.

WILLETT S. MAIN.

Subscribed and sworn to before me this 3d day of March, A. D. 1879.
F. M. STEWART, *Clerk.*

Afterwards, to wit, on the 7th day of March, A. D. 1879, came the said district attorney and filed the following stipulation, viz:

Stipulation.

District court of the United States, western district of Wisconsin.

UNITED STATES OF AMERICA *vs.* TWENTY-FIVE POUNDS OF HOPS AND OTHER Property.	In rem.

It is hereby stipulated that an order may be entered in the above suit requiring the marshal of this court to sell, at public auction, ac-

cording to the rules and practice of this court in actions in rem, all the personal property seized in the above action and now in custody of said marshal, and especially all of said property that is in its nature perishable, or the keeping of which involves much expense, and especially all the beer and live stock so seized and held in custody, and that the proceeds of such sale be brought into court to abide the final order, decree, and judgment of said court in the premises.

Madison, March 3d, 1879.

24 H. M. LEWIS,
Att'y for Plaintiffs.
J. T. MILLS, AND
KEYES & CHYNOWETH,
Att'ys for Claimant & Mortgagee Eliza Bergener.
KEYES & CHYNOWETH,
Attorneys for Claimant and Mortgagee Bernard Emholt.

And thereupon, to wit, on the said 9th day of March, A. D. 1879, in the record of the proceedings herein, appears the following order, to wit:

Order to sell personal property.

District court of the United States for the western district of Wisconsin.

UNITED STATES OF AMERICA
vs.
TWENTY-FIVE POUNDS OF HOPS AND OTHER PROPERTY. } In rem.

On reading and filing the affidavit of Henry Harnden, collector of internal revenue for the second collection district of Wisconsin, showing that a portion of said personal property is perishable, and that other of said property is being kept at great expense, and that the value thereof will soon be consumed in such keeping and care, and on reading and filing the stipulation made and entered into between H. M. Lewis, U. S. attorney, for plaintiffs, and J. T. Mills and Keyes and Chynoweth, attorneys for claimants Eliza Bergener and Bernard Emholt, it is, on motion of H. M. Lewis, attorney for plaintiffs, ordered and decreed that the following of said personal property, to wit, 188½
25 barrels of beer, 56 ½ beer-stamps, one span of mules, three bay horses, three (3) cows, two setts double harness, two bob-sleighs, two double wagons, three hundred bushels of corn in cob, fifty bushels of oats, eighty ½ beer-kegs, and thirty-five ½ beer-kegs, be sold at public auction, by the marshal of this court; that said marshal give ten days' notice of such sale by publishing a notice thereof in a newspaper published in said county of La Fayette, and causing three notices to be posted in the village of Shullsburg, in said county of La Fayette; that the marshal deposit the proceeds of said sale in this court, subject to the final order, judgment, or decree of this court; that the lien, if any, of any claimant to said property be transferred to said fund without prejudice to the rights of any party, plaintiffs or claimant.

Dated March 7th, 1879.

R. BUNN, *Judge.*

Whereupon a writ of venditioni exponas issued, which, with the return of the marshal thereon, is in the words and figures following, viz:

Venditioni exponas.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to the marshal of the western district of Wisconsin, greeting:

Whereas an information was filed in the district court of the United States for the western district of Wisconsin, on the twentieth day of
26 January, A. D. 1879, by H. M. Lewis, esq., United States district attorney, against twenty-five pounds of hops and other property, praying that the same might be condemned as forfeited to the use of the United States;

And whereas the said property, goods, wares, and merchandise have been attached by the process issued out of the said district court, in pursuance of the said information, and are now in custody by virtue thereof, and such proceedings have been thereupon had that by the interlocutory order, sentence, and decree of this court in this case made and pronounced on the 7th day of March, A. D. 1879, certain of the said property, goods, wares, and merchandise, to wit, 188½ barrels of beer, 56 ⅛ beer-stamps, one span of mules, three bay horses, three cows, two setts double harness, two bob-sleighs, two double wagons, three hundred bushels of corn on the cob, fifty bushels of oats, eighty ¼ beer-kegs, and thirty-five ⅛ beer-kegs, were ordered to be sold by you, the said marshal, after giving ten days' notice of such sale according to law; and that you have the moneys arising from such sale, together with this writ, at a district court of the United States for the western district of Wisconsin, to be held in the city of Madison, on the first Monday of June, A. D. 1879, and that you then or previously pay the same to the clerk of this court:

Therefore you, the said marshal, are hereby commanded to cause the said property, goods, wares, and merchandise so condemned and ordered to be sold to be sold in manner and form, upon the notice, and at the time and place by law required. And that you have and pay the moneys arising from such sale pursuant to the aforesaid order or decree, and have also then and there this writ.

27 Witness the honorable Romanzo Bunn, judge of said court, and the seal thereof, at Madison, this 9th day of March, A. D. 1879.

[L. S.] F. M. STEWART, *Clerk.*

Marshal's return thereon is as follows:

Return.

By virtue of the within writ, I duly advertised the property described herein (as per printed notice of said advertisement annexed hereto appears), and on the 26th day of March, 1879, at one o'clock p. m., at Shullsburg, Wisconsin, I sold at public auction the following items of said property (there being no bidders for the balance of said property), viz:

1 span of bay mules	$40 00
1 horse, six years old	39 00
1 " 5 " "	41 00
1 " (blind)	7 00
1 light wagon	11 00
1 heavy "	13 00
2 p's bob-sleds	15 00

2 setts harness, $9 & $10	19 00
1 lot of corn, estimated 200 bu	21 00
30 bushels of oats	3 00
3 cows, $15, $30, & $11	56 00
	$265 00

And I have paid into the U. S. court the full amount of said sum of $265.00, and have receipt therefor, dated March 29, 1879, and my costs are as follows:

Service	$1 00
Travel to advertise, 150 m	9 00
" " sell 135 "	8 10
Percentage on $265.00	13 25
Paid J. B. Cutting, custody said property from Jan'y 24, '79, to	
28 Paid Wm. Leahy, watchman, 5 days and nights	$
" Miss Hoskins, board of Lahey	3 00
" Gen'l Harnden's bill	6 45
" Thos. H. Bright, appraiser, 2 days	3 00
" Peter Baker, " " "	3 00
" C. W. Priestly, " " "	3 00

F. W. OAKLEY, *U. S. M.*

And afterwards, to wit, on the 12th day of March, A. D. 1879, came the claimant, Eliza Bergener, by her attorneys herein, and filed her answer in words and figures as follows:

Answer of Eliza Bergener.

District court of the United States for the western district of Wisconsin.

THE UNITED STATES
versus
TWENTY-FIVE POUNDS OF HOPS, &C.

The answer of Eliza Bergener, claimant and mortgagee of an undivided one-half interest of the said certain tract, piece, parcel of land, and premises situate, lying, and being in the county of La Fayette and State of Wisconsin, known, designated, and described as follows, to wit: Commencing at the southeast corner of the northeast quarter of the southwest quarter of section number three (3), in town number one (1) north, of range number two (2) east of the fourth principal meridian, running thence north $9\frac{50}{100}$ chains, thence west $3\frac{06\frac{5}{10}}{100}$ chains, thence south $9\frac{50}{100}$ chains, thence east $3\frac{06\frac{5}{10}}{100}$ chains, to
29 place of beginning, containing three (3) acres of land, more or less, magnetic variation 8° 30′ east; and claimant and mortgagee of an undivided one-half interest in and to the said span of bay mules, two wagons, two setts double harness, two pairs bobsleds, two hundred bushels of barley, fifty bushels of malt, one hundred and eighty-eight and $\frac{1}{2}$ barrels of beer, the beer-barrels, casks, and kegs, and beer-tubs, the large mash-tub, the mash-machine, water-pump, beer-pump, rotary pump, patent beer-cooler, the malt-mill and power, and brass faucets mentioned in the information herein, to the information filed herein in behalf of the United States.

And now comes Eliza Bergener, claimant and mortgagee as aforesaid, and for answer to the said information against the said twenty-

five pounds of hops and other property therein described, by J. T. Mills and Keyes & Chynoweth, her attorneys, says that the property, real and personal, in the information mentioned did not, nor did any part thereof, become forfeited in manner and form as in the said information in that behalf alleged.

And the said claimant and mortgagee, for further answer to the said information, shows and alleges that on the 22d day of January, A. D. 1878, Peter Lauderbach, the same who is mentioned in the information herein, was, and for a long time previous thereto had been, the owner in fee simple of an undivided one-half interest in and to the real estate in the said information particularly described, and the owner of an undivided one-half interest in and to that part of the personal property mentioned in the said information which is above enumerated; that on the said 22d day of January, A. D. 1878, for a valuable consider-
30 ation, the said Peter Lauderbach, at Shullsburg, Wisconsin, district aforesaid, made, executed, and delivered to this claimant his certain promissory note in writing, bearing date the day and year last aforesaid, whereby, for value received, he promised to pay to this claimant, or order, the sum of two thousand dollars, with interest at the rate of nine per cent. per annum from date until paid, interest to be paid annually; and to secure the payment of the principal and interest mentioned in the said promissory note the said Peter Lauderbach and Julia Lauderbach, his wife, did at the same time execute, under their hands and seals, and deliver to the said Eliza Bergener, a mortgage bearing even date with the said promissory note, and conditioned for the payment of the sum and interest mentioned in the said note, as herein specified, by which mortgage the said mortgageors mortgaged unto the said Eliza Bergener, in fee, the undivided one-half interest in and to the said lands and real estate, stone brewery, and the additions and sheds and buildings appurtenant to said stone brewery, and the barn and dwelling-house and corn-crib situate on said premises, and all other buildings thereon and appurtenant thereto, described in the information herein, which said mortgage was attested by two subscribing witnesses, and was duly acknowledged and recorded in the office of the register of deeds for the county of La Fayette, district aforesaid, on the 28th day of January, A. D. 1878, at eleven and one-half o'clock in the forenoon of said day, in volume twenty-two of mortgages, on page two hundred and twenty-eight of said volume. And the said Peter Lauderbach did, at the same time, also, to secure the payment of the principal and interest mentioned in said note, execute, under his hand and seal, and deliver to the said Eliza Bergener, claimant and
31 mortgagee as aforesaid, a chattel mortgage, bearing even date with the said promissory note, and conditioned for the payment of the sum and interest mentioned in the said note as herein specified, by which chattel mortgage the said mortgageor mortgaged unto the said Eliza Bergener the undivided one-half interest in and to that part of the personal property mentioned in the information herein which is hereinbefore specifically enumerated, which said chattel mortgage was duly attested by two subscribing witnesses, and was filed in the office of the town clerk of the town Shullsburg, on the said day last named; that the said town of Shullsburg last named is situated in La Fayette County, district aforesaid, and is the residence of the said Peter Lauderbach and the said Severin Schulte mentioned in the information herein, and that the property personal described in the information herein has been in said town ever since the execution of the chattel mortgage

as aforesaid. In said chattel it was, among other things, stipulated and agreed by and between the said Peter Lauderbach and this claimant that, in case of the non-payment of said sum of money, or any part thereof, at the time mentioned, the said claimant should have the right to take possession of the said personal property described in the said chattel mortgage, and hereinbefore specifically enumerated. That the interest which fell due on the said note on the 22d day of January, A. D. 1879, the said Lauderbach failed and neglected to pay, and has not since paid the same, or any part thereof, and there is now due and owing on the said note the said sum of one hundred and eighty dollars, and to become due the said sum of two thousand dollars,
32 and interest at the rate of nine per cent. per annum from the said 22nd day of January, 1879, from the said Peter Lauderbach to this claimant. That this claimant is now, and continually has been since the said 22d day of January, A. D. 1878, the legal owner and holder of the said notes and mortgages, and each and all of them.

And this claimant, further answering, shows and alleges that on the 12th day of August, A. D. 1867, one Severin Schulte, and the same who is mentioned in the information herein, was the owner in fee simple of the real estate described in the said information herein and the whole thereof; that, on that day, at Shullsburg aforesaid, the said Severin Schulte made, executed, and delivered to one William Look his certain promissory note in writing, bearing date the said 12th day of August, A. D. 1867, whereby, for value received, the said Severin Schulte promised to pay to the said William Look, or order, four years from date, forty-five hundred dollars, with interest at the rate of ten per cent. per annum, to be paid annually; and to secure the payment of the principal sum and interest mentioned in said note the said Severin Schulte and Mary Schulte, his then wife, did at the same time execute, under their hands and seals, and deliver to the said William Look a mortgage bearing even date with the said note, and conditioned for the payment of the sum and interest mentioned in the said note, as herein specified, by which mortgage the said mortgagors mortgaged unto the said William Look, his heirs and assigns, in fee, the lands and premises in the said information described, and the whole thereof, which said mortgage was attested by two subscribing witnesses, and was duly acknowledged, and was duly stamped with United States internal-revenue stamps of the value and denominations required
33 by law in that behalf, and said stamps duly cancelled, and was recorded in the office of the register of deeds for La Fayette County, on the said 12th day of August, A. D. 1867, at two o'clock p. m. of said day, in volume twelve of mortgages, on page four hundred and seventy-four of said volume. That thereafter, and on the 12th day of August, A. D. 1874, the said William Look, who was then, and ever since its date had been, the legal owner and holder of the said note and mortgage, by an instrument in writing under his hand and seal, attested by two subscribing witnesses and duly acknowledged, assigned the said mortgage and the said note, for value received, to one Jacob and Christian Haffele, who, from said 12th day of August, A. D. 1874, to the 22nd day of January, A. D. 1878, were the legal owners and holders of the said note and mortgage. That sometime prior to the said 22d day of January, A. D. 1878, the said Severin Schulte and his wife had granted, bargained, sold, and conveyed an undivided one-half interest in and to the said premises, for value received, to the said Peter Lauderbach, and he, the said Lauderbach, had, for value received, assumed and agreed to pay the said note and mortgage last above mentioned.

That there was due and unpaid upon the said note and mortgage last above named, from the said Lauderbach to the said Haffele, the sum of $798.56 dollars; that the balance of the same had been paid previously thereto. That this said sum last named was, on the day last named, advanced and loaned by this claimant to the said Lauderbach for the sole purpose of paying up and discharging the said note and mortgage to the Haffeles, and not otherwise. That the said Lauderbach
34 paid to the said Haffeles the identical sum so loaned and advanced by this claimant as aforesaid, and they thereupon released and discharged the said note and mortgage. That the said sum so loaned and advanced the said Lauderbach forms, in part, the consideration for the note and mortgage first above mentioned, dated the said 22nd day of January, A. D. 1878. That the note and mortgage above mentioned was, up to the said 22d day of January, A. D. 1878, and the said mortgage dated the day last named, has been ever since said last named date, and now is, a good, valid, and subsisting lien upon the said premises in the full amount thereof, prior to the lien of the Government of the United States therein.

And this claimant, further answering the said information, shows and alleges that at the time she took her mortgage on the said premises, to wit, the said 22nd day of January, A. D. 1878, and at all times previous thereto, the said premises described in the information herein were used and occupied as a brewery, and not otherwise; and this claimant says that she never knew, never had any reason to know, that the same were used for any other purpose whatever, or in any other capacity; that she never knew that the same were used as a distillery, either before or since, or on that day, or that any still had been erected therein, or that there was any distilling apparatus of any kind or nature whatsoever in or about or upon said premises. And this claimant denies that she ever knowingly suffered or permitted the business of distiller to be carried on on said premises, and denies that she connived at the same. And denies that she knowingly suffered or permitted said premises described in the information herein to be
35 used for ingress or egress to or from the said distillery described in the information herein, or any other distillery.

And, for further answer to said information, this claimant further shows and alleges that as to each and every allegation, matter, and thing in said information contained, not hereinbefore specially admitted, denied, or answered, she has not knowledge sufficient to form a belief, and therefore denies the same.

Wherefore this claimant prays for judgment, that her interests and rights in and to the property in the said information described be protected, and that the court decree that the said property be sold, if sold at all, subject to the lien of her mortgages, as hereinbefore set forth, or that the information herein be dismissed with costs to be taxed to this complainant.

ELIZA BERGENER,
Complainant.

J. T. MILLS AND
KEYES & CHYNOWETH,
Claimant's Attorneys.

STATE OF WISCONSIN,
La Fayette County, ss:

Eliza Bergener, being first duly sworn, upon her oath deposes and says that she has heard read the foregoing answer to the information

herein, and knows the contents thereof; that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

ELIZA BERGENER.

Subscribed and sworn to before me this 11th day of March, A. D. 1879.

36 [SEAL.] P. B. SIMPSON,
Notary Public, La Fayette Co., Wis.

And on the same day, to wit, on the 12th day of March, A. D. 1879, said claimant filed stipulation for costs as follows, viz:

Stipulation for costs.

District court of the United States for the western district of Wisconsin.

UNITED STATES
vs.
25 POUNDS OF HOPS, &C.

Whereas an information was filed in this court on the 20th day of January, in the year of our Lord one thousand eight hundred and seventy-nine, by H. M. Lewis, esq., district attorney of the United States for the western district of Wisconsin, in behalf of the United States, against twenty-five pounds of hops and other property, real and personal, described in the information herein, for the reasons and causes in the said information mentioned, and praying that the said 25 lbs. of hops and other property, real and personal, may be forfeited to the use of the United States, to answer the prayer of the said information, and

Whereas a claim has been filed in said cause by Eliza Bergener, and the said claimant and Peter C. Meloy, of the town of Shullsburg, La Fayette County, Wisconsin, surety, the parties hereto, hereby consenting that in case of default or contumacy on the part of the claimant
37 or her surety a summary decree may be entered against them, and each of them, and that execution thereon for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands:

Now, therefore, we, the undersigned stipulators, submitting ourselves to the jurisdiction of this court, do acknowledge ourselves to be bound unto the said United States, or whomsoever it may concern, the said Eliza Bergener, as principal, and the said Peter C. Meloy, as surety, jointly and severally, in the sum of two hundred and fifty dollars, lawful money of the United States, conditioned that if the claimant above named shall pay all costs and expenses which shall be awarded against her by the final decree of this court, or, upon an appeal, by the appellate court, then this stipulation shall be void; otherwise to remain in full force and effect.

ELIZA BERGENER. [SEAL.]
PETER C. MELOY. [SEAL.]

In presence of—
P. B. SIMPSON.

Taken and acknowledged this 11th day of March, A. D. 1879, before me.

[SEAL.] P. B. SIMPSON,
Notary Public, La Fayette Co., Wis.

STATE OF WISCONSIN,
La Fayette County, ss:

Peter C. Meloy, the surety in the foregoing obligation named, being first duly sworn, upon his oath deposes and says that he is a resident and freeholder of the State of Wisconsin, and resides in La Fayette
38 County, western district thereof, and is worth the sum of five hundred dollars over and above all his just debts and liabilities, and exclusive of property exempt by law from execution.

PETER C. MELOY.

Subscribed and sworn to before me this 11th day of March, A. D. 1879.

[SEAL.] P. B. SIMPSON.
Notary Public, La Fayette Co., Wis.

And afterwards, to wit, at a special term of said court held on the 19th day of March, A. D. 1879, in the record of the proceedings aforesaid, appears the following entry, to wit:

UNITED STATES OF AMERICA
vs.
TWENTY-FIVE POUNDS OF HOPS AND OTHER PROPERTY. } Information in rem.

And now on this day the crier made proclamation in this cause as follows: Hear ye! Hear ye! Hear ye! All persons having anything to say why the said 188 ⅛ barrels of beer, 56 ⅛ beer-stamps, one span of mules, three bay horses, three cows, two setts double harness, two box-sleighs, two double wagons, 300 bushels of corn in cob, 50 bushels of oats, 80 ¼ beer-kegs, and 35 ¼ beer-kegs, &c., should not be condemned and sold as forfeited to the use of the United States, pursuant to the prayer of the information herein, come forward and make your allegations in that behalf. And no person having offered or interposed a claim, it is ordered that the default of all persons who have not appeared and filed claims to said goods, wares, and merchandise be, and is hereby, entered; and it is further ordered, adjudged, and decreed that the said goods,
39 wares, merchandise, and other property be, and the same hereby are, for the reasons set forth in the information herein, condemned as forfeited to the use of the United States; and that the clerk issue to the marshal of this district the usual writ of venditioni exponas, commanding him, the said marshall, to sell the said property above described and pay the proceeds into court, to be distributed according to law.

And afterwards, to wit, on the 6th day of June, A. D. 1879, in the record of the proceedings aforesaid, appears the following entry of trial, to wit:

Trial.

UNITED STATES OF AMERICA
vs.
TWENTY-FIVE POUNDS OF HOPS AND OTHER PROPERTY. } Information in rem.

This day came the district attorney and the claimants, by their attorneys, and the issue herein came on to be tried, whereupon a jury is

ordered to come, who came, to wit, F. R. Melvin, James Miller, John Slothower, E. J. Doll, A. A. Boyce, Estes Wilson, John Slavin, B. B. Bowell, M. J. Cantwell, A. J. Welton, H. A. Stone, William Fuller, twelve honest and lawful men of the district, duly empanneled, tried, and sworn, and the trial commenced.

And afterwards, to wit, on the 7th day of June, A. D. 1879, in the record of the proceedings aforesaid appears the following entry and special verdict, to wit:

Special verdict.

40 UNITED STATES OF AMERICA
vs.
TWENTY-FIVE POUNDS OF HOPS AND OTHER PROPERTY. } Information in rem.

This day came the parties, by their attorneys, and the trial being concluded, the jury is instructed in the law by the court and retire to consider of their verdict; and the jurors of the jury aforesaid came into court with the following special verdict: We, the jury duly empanneled and sworn to try the issue joined in this action, find that one Severin Schulte, upon the premises and real estate described in the information filed in this action, from April , A. D. 1874, to the 28th day of December, in the year 1875, carried on the business of a distiller in the manner charged in the said information, and that he defrauded the United States of the tax on the spirits distilled by him during said time, and that he carried on said distillery business during said time with intent to so defraud the said United States of the tax upon the spirits so distilled by him, and that he is guilty of the offenses against the revenue laws of the United States charged in said information in that behalf; that, during said time, he, the said Severin Schulte, was the owner of and held the legal title to said premises and real estate described in said information, subject to a mortgage made and executed by said Severin Schulte and wife to the said claimant Bernard Emholt, given to secure the payment of the sum of three thousand dollars, and which said mortgage bears date on the 12th day of August, A. D. 1867, and was recorded in the register of deeds' office for La Fayette County, Wisconsin, on the 12th day of February, A. D. 1867, in volume 12 of mortgages, on page 475.

41 And the said jury further find that, on the 28th day of December, A. D. 1875, the said Severin Schulte sold and conveyed an undivided one-half of said real estate and premises to one Peter Lauderbach, subject to said mortgage, and that thereafter and until the 16th day of January, A. D. 1879, said premises were owned and occupied, and the legal title thereof held by the said Severin Schulte and Peter Lauderbach as tenants in common, each an undivided one-half interest, subject to the incumbrances hereinbefore and hereinafter mentioned, and subject to the right of the United States in the said premises acquired therein by the said United States by reason of the said unlawful acts of the said Severin Schulte before stated; and that from said 28th day of December, A. D. 1875, to said 16th day of January, A. D. 1879, said Schulte and said Lauderbach carried on the business of distillers on said premises, as charged in said information, without giving the bond required by law to be given by them, the said Schulte and Lauderbach, as such distillers, and with intent to defraud

the United States of the tax on the distilled spirits so manufactured by them, and that they, during said time, were guilty of the offenses charged against them in said information.

And we further find that, on the 22nd day of January, A. D. 1878, said Peter Lauderbach and wife executed to the claimant Eliza Bergener a mortgage upon his undivided one-half interest in said real estate, to secure to her the payment of the sum of two thousand dollars and interest, which mortgage bears date on said day, and was recorded in the register of deeds' office for said county of La Fayette on the 28th day of January, A. D. 1878, in volume 20 of mortgages, p. 228; and that on the 22nd day of January, A. D. 1878, said claimant Bernard
42 Emholt satisfied and discharged of record in said office of register of deeds for La Fayette County, Wisconsin, said mortgage so executed by the said Severin Schulte and wife to said claimant on said 12th day of August, A. D. 1867; and that on the 22nd day of January, A. D. 1878, said Severin Schulte and wife executed to said claimant Bernard Emholt a mortgage conveying his undivided one-half interest in said premises, to secure the payment of the sum of twenty-eight hundred dollars, which said mortgage was dated on said 22nd day of January, A. D. 1878, and recorded in said register of deeds' office on the 28th day of January, A. D. 1878, in volume 20 of mortgages, on page 229; and that said mortgage last mentioned was given to secure part of the indebtedness secured by said mortgage for three thousand , dated on the 12th day of August, 1867, and so satisfied and discharged of record on the 22nd day of January, A. D. 1878.

A. A. BOYCE,
Foreman.

And afterwards, to wit, on the 18th day of June, A. D. 1879, in the record of the proceedings aforesaid appears the following entry of hearing, to wit:

Hearing.

UNITED STATES OF AMERICA
vs.
25 ⅌ OF HOPS, &C.
} Information in rem.

This day came the parties, by their attorneys, and the motion for judgment on the special verdict is argued.

And on the 19th day of June, A. D. 1879, in the record of the proceedings aforesaid appears the following entry of hearing concluded, viz:

43 *Hearing concluded.*

UNITED STATES OF AMERICA
vs.
25 ⅌ OF HOPS, &C.
} Information in rem.

This day came the parties, by their attorneys, and the argument of the motion for judgment is concluded and same submitted.

And thereafter, to wit, on the 25th day of July, A. D. 1879, in the record of proceedings aforesaid appears the following decree, viz:

Decree.

District court of the United States, western district of Wisconsin.

UNITED STATES OF AMERICA
vs.
TWENTY-FIVE POUNDS OF HOPS AND OTHER Property; Bernard Emholt and Eliza Bergener, claimants.

The jury impanneled to try the issue joined between the United States of America, informants against the property fully described and set forth in the information in this action, Bernard Emholt and Eliza Bergener, claimants, by virtue of certain mortgages upon said real and personal property, as set forth and described in their respective answers herein, having found and returned a special verdict, and said cause having been argued and submitted, on the motion of said informants, for judgment on said verdict condemning said property as forfeited to the United States, H. M. Lewis, United States district
44 attorney for the western district of Wisconsin, appearing in support of said motion, and Mess. Keyes and Chynoweth and J. T. Mills, attorneys for said claimants, in opposition thereto, and the court being sufficiently advised of and concerning its judgment, on motion of said United States district attorney—

It is considered, ordered, and adjudged that the said mortgages of said claimants, so as aforesaid set forth, mentioned, and described in their respective answers and claims herein, are not, and neither of them is, a lien and incumbrance upon said real and personal property described in the information herein as aforesaid, or upon any portion, part, or parcel of the same as against the said United States.

And it is further considered, ordered, and adjudged and decreed that all and singular the said real and personal property so as aforesaid described in the information herein be, and the same hereby are, condemned as forfeited to the United States.

And it is further considered, ordered, adjudged, and decreed that the usual writ of venditioni exponas be issued to the marshal, commanding him to sell the said real and personal property aforesaid, and bring the proceeds of such sale into this court to be distributed according to law.

And in the record of the proceedings aforesaid on the same day, to wit, on the said 25th day of June, A. D. 1879, there appears the following entry, to wit:

Prayer for appeal, &c.

45 UNITED STATES OF AMERICA
vs.
25 POUNDS OF HOPS, &C.

And now on this day came the said claimants, by their said attorneys, and pray an appeal to the circuit court of the United States for the western district of Wisconsin from the final order and decree herein.

Whereupon it is ordered that said appeal be, and the same is hereby, allowed, and that a transcript of the proceedings herein be transmitted to the said circuit court.

Certificate of clerk.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. M. Stewart, clerk of the district court of the United States for the western district of Wisconsin, hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of the said district court, at my office, in the city of Madison, in said district, this 25th day of July, A. D. 1879, and of our Independence the one hundred and fourth.

[L. S.] F. M. STEWART, *Clerk.*

45½ And on the same day, to wit, on the said 25th day of July, A. D. 1879, in the record of the proceedings aforesaid in said entitled cause there appears the following entry, to wit:

Hearing and decree.

BERNARD EMHOLT AND ELIZA BERGENER, claimants, &c.,
vs.
THE UNITED STATES OF AMERICA. } In equity.

This cause coming on this day to be heard, after hearing counsel for the respective parties, Messrs. Keyes and Chynoweth and J. T. Mills appearing for said claimants, and H. M. Lewis, U. S. attorney for said district, for the said United States, and being sufficiently advised of and concerning the same, it is by the court now here considered, ordered, adjudged, and decreed that so much of the decree of the district court of and for the western district of Wisconsin made and entered on the 25th day of July, A. D. 1879, as adjudges and decrees that the respective mortgages of the claimants, Bernard Emholt and Eliza Bergener, are not, and neither of them is, a lien or incumbrance upon the real estate described in the information herein, or upon any portion, part, or parcel of the same, as against the said United States, is hereby reversed and set aside.

And upon the hearing of said cause the following question, upon which said judges were divided, and is stated and certified as follows:

46 *Certificate of division.*

Circuit court of the United States, western district of Wisconsin.

BERNARD EMHOLT & ELIZA BERGENER, claimants, &c.,
vs.
UNITED STATES OF AMERICA, INFORMANTS.

This cause coming on this day to be heard, Messrs. Keyes and Chynoweth and J. T. Mills appearing for the claimants, and H. M. Lewis, U. S. district attorney, for the said informants, the hearing upon the special verdict found in the district court was, by consent of parties,

had before the circuit justice and the district judge. But said judges were divided in their opinion as to whether, upon the facts found in the said special verdict, the United States were entitled to judgment forfeiting the property described in the information to the use of the United States, except subject to the interest and claim of the claimants, Bernard Emholt and E. Bergener, respectively, as set out in their respective answers.

The district judge was of the opinion that the claim of the United States was prior to those of the claimants, while the circuit justice was of opinion that the United States was not entitled to a judgment or decree except subject to the mortgage claims of said claimants as set out in their respective answers.

47 The foregoing point upon which said judges disagreed is now stated and certified, and this certificate is directed to be entered of record.

JOHN M. HARLAN,
Circuit Justice.

And in the said record of proceedings aforesaid, and on said 25th day of July, A. D. 1879, appears the following entry, to wit:

Prayer for appeal.

BERNARD EMHOLT AND ELIZA BERGENER, claimants, &c.,
vs.
UNITED STATES OF AMERICA, INFORMANTS.

And now on this day came the said informants, by H. M. Lewis, U. S. district attorney for the western district of Wisconsin, and pray an appeal herein to the Supreme Court of the United States.

Whereupon it is ordered that said appeal be, and is hereby, allowed.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom and of the whole thereof.

48 In testimony whereof I have hereunto set my hand and duly affixed the seal of the said circuit court, at my office, in the city of Madison, in said district, this 15th day of August, A. D. 1879, and of our Independence the one hundred and fourth year.

[SEAL.] F. M. STEWART, *Clerk.*

49 United States of America to Bernard Emholt and Eliza Bergner, claimants, &c., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal in the circuit court of the United States for the western district of Wisconsin, wherein the United States of America, informants, are appellants and you are appellees, to show cause, if any there be, why the decree rendered in said

circuit court of the United States for the western district of Wisconsin should not be reversed.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court of the United States, this 12th day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

R. BUNN,
Dist. Judge.

(Indorsed:) U. S. Supreme Court. United States vs. Bernard Emholt et al. Citation.

Service of above admitted this 1st day of September, A. D. 1879.

KEYES & CHYNOWETH,
Att'ys for Claimants.

(Indorsement on cover:) No. 238. The United States, appellants, vs. Bernard Emholt and Eliza Bergener, claimants, &c. W. Wisconsin C. C. U. S. Filed 5th September, 1879.

REC. 238—3

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 238.

THE UNITED STATES, APPELLANTS,

vs.

EMHOLT, &c.

Brief for the United States.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 238.

THE UNITED STATES, APPELLANTS,

vs.

EMHOLT, &c.

BRIEF FOR THE UNITED STATES.

This was an information seeking a forfeiture of certain real estate and personal property connected with the distillery of Schulte & Lauderbach, at Shullsburg, Wis., upon the grounds (Record, p. 4, "7th") that the distillery had been carried on without a bond having been given; and with intent to defraud the United States of tax, &c.

The appellees here are parties who had intervened as mortgagees of the distillery premises, the *bona fides* of their conveyances not being impeached.

At the trial a special verdict was found, as follows: (Record, p. 20.)

Schulte had carried on distillation, as charged, in fraud of the United States from April, 1874, to December 28, 1875; at which time he sold one-half of said premises to Lauderbach, and thereafter they continued such fraudulent business jointly until January, 1879.

In August, 1867, Schulte had executed a mortgage of the premises to the claimant Emholt, to secure the sum of $3,000, such mortgage having been recorded in February, 1869; and on the 22d of January, 1878, this was satisfied and discharged of record, and on the same day Schulte executed to Emholt another mortgage (covering only one-half of the premises retained by him after the sale to Lauderbach) to secure $2,800, being part of the original mortgage debt of 1867. This mortgage was recorded on the 28th of January, 1878.

On the same 22d of January, 1878, Lauderbach mortgaged to the claimant Bergener the one-half of the premises bought by him from Schulte, to secure $2,000, and this conveyance was also recorded on the 28th of January, 1878.

Upon this verdict the learned judges who presided at the trial were divided in opinion *whether* "*the United States were entitled to judgment forfeiting the property described in the information to the use of the United States, except subject to the interest and claim of the claimants Bernard Emholt and E. Bergener, respectively, as set out in their respective answers.*"

Thereupon, judgment having been pronounced in accordance with the opinion of the circuit justice, the United States appealed.

It is submitted that so far as regards the claim of Bergener, (*to one-half of the land,*) such judgment is *erroneous.*

As the words *forfeit* and *forfeiture* are terms of art at common law, it is to be assumed, unless the context forbids, that when used in a Statute of the United States, they are used in their common law sense. (1 Kent, 360, &c.)

As is well known at common law only *the interest of the guilty party* in the property, whether land or personalty, was forfeitable; *ex. gr.*, "goods and chattels which he had in possession in his own right;" and "Lands and tenements which he had in his own right." (Comyn Dig., 4, pp. 401, &c.; Black, 4, 381, &c.) That interest, however, as regards lands was to be ascertained by relation to the time of the *commission of the offense*, whilst, as regards personalty it was to be ascertained as of the date of the conviction.

So, therefore, it would be in case of statutory forfeitures, but for their special wording.

In a long line of cases ending with *Thacher's Distilled Spirits*, 103 U. S., p. 679, it appears, with great uniformity, that the wording of United States statutes declaring forfeitures, operate so as to cause personal property to be forfeited by relation to the time of the *offense*. Justice Story contended for the common law doctrine with great zeal in the *Coffee Case*, 8 Cranch, 405, but was overruled, and the above variation has remained ever since unshaken.

This results from statutory phraseology, about which it is to be said that in order to place both species of property upon the same footing as regards the time to which forfeiture relates, it was necessary that a change of the common law definition of forfeiture should be made. That change might have placed land upon the same footing with personalty at common law, or *vice versa*. Policy has demanded, as appears, that personalty should be placed on the same footing with land at common law, and uniformity as regards the two kinds of property has been reached thus. Change has been made in fixing the time of forfeiture for personalty, but none for land.

I have not found a case in which the rule has been definitely stated as to land; but in none of the numerous cases in this Court as to personalty has any distinction been suggested between the two sorts of property, the language of the Court always agreeing with that with which Thacher's case concludes:

"Though claimant's counsel sets up the innocence of the present claimant in regard to the fraud or any knowledge of it, it can hardly be necessary at this day to reconsider the doctrine that when the act has been done which the law declares to work a forfeiture of the property, the right of the Government to seize the property, and assert the forfeiture attaches at once, and may be pursued by the Government wherever and in whose hands soever that property may be found. (See Henderson's Distilled Spirits, 14 Wall., 44.)"

In point of modern policy it seems that a *bona fide* purchaser of personal property is as much entitled to protection as if he were a purchaser of land.

The statute which governs this case (*Richardson*, p. 132) is quoted at length in the brief of the learned counsel for Bergener. As regards the land subject to forfeiture, it will be seen that it, in effect, adopts the common law designation, viz., "All the right, title, and interest of such person in the lot or tract of land in which such distillery is situated."

There seems to be a difference in principle (as regards the effect of the forfeiture) between the Emholt mortgage, and that of Bergener.

1. The Emholt mortgage of 1878 is, for all present purposes, practically the same, as regards the one-half of the premises therein contained, as the mortgage of 1867. It is

a renewal of the original mortgage, made to secure a part of the original debt, or, substantially a purchase-money mortgage. (Freeman, Judg'ts, sec. 373.)

The effect of the failure to record the second mortgage for six days after its execution depends upon the registration laws of Wisconsin. These have no operation in the present case. (Wisc. Rev. Stats., sec. 2241.)

Upon the whole, it is to be admitted, that the Emholt mortgage has priority over the forfeiture.

2. I submit that it is otherwise as regards the Bergener mortgage.

Here the money secured in 1878 had no connection with the original debt. The mortgage, therefore, did not unite with that of 1867.

There was a period of time after the *discharge* of the original mortgage, however short, in which Lauderbach had a beneficial interest in his half of the premises, during which, therefore, the forfeiture attached, so as to become *prior in tempore, &c.*

It is laid down by Lord Coke, that of a *seisin for an instant*, a woman, shall not be endowed. This position is thus explained by Sir W. Blackstone:

"The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine,) such a seisin will not entitle the wife to dower, for the land was merely *in transitu*, and never rested in the husband; the grant and render being made one continued act. But if the land abides in him for the interval of but a single moment, it seems the wife shall be endowed thereof."

Sir J. Jekyll has also said that a woman is not entitled to dower out of an instantaneous seisin. The cognizee of a fine is not so seised as to give his wife a title to dower; nor in the case of a use has the widow of a trustee any claim to dower from such a momentary seisin in her husband. (Gr. Cruise, 1, pp. 171–2.)

In a note to this passage Mr. Greenleaf adds:

The true question in these cases is, whether the seisin was legally beneficial to the husband. If it was, though for ever so short a time, the right of dower attaches to it. But if it was in the husband only for the purpose of transmission to another, and not absolutely, it does not. The case of Broughton *vs.* Randal, (Cro. El., 503; 1 Roper on Husb. and Wife, 369,) where father and son were hanged at the same time, but one of them lived a moment longer the other, is an example of the former. So where A conveyed to B, and B at the same time conveyed the same land to C, it was held that B's widow was entitled to the dower. (Stanwood *vs.* Dunning, 2 Shepl., 290.) An example of the latter is where land is conveyed in fee, and at the same time mortgaged to secure the purchase money either to the grantor or to a stranger who has advanced it. (Clarke *vs.* Munroe, 14 Mass., 351; Holbrook *vs.* Finney, 4 Mass., 566; Bullard *vs.* Brown, 10 N. Hamp., 500; Maybury *vs.* Brien, 15 Peters, 21.)

S. F. PHILLIPS,
Solicitor General.

H. D FARQUHARSON Printer, Lancaster, Wisconsin.

Supreme Court,

United States.

OCTOBER TERM, 1881, No. 238.

THE UNITED STATES

vs.

ELIZA BERGENER, &c.

No 238

Division of Opinion from Circuit Court for Western District of Wisconsin.

J. T. MILLS, and
GEO. C. HAZELTON,
Attorneys for
MRS. BERGENER.

Supreme Court,

United States.

OCTOBER TERM, 1881, No. 292.

THE UNITED STATES

vs.

FELIX REILLY.

Division of Opinion from Circuit Court for Western District of Wisconsin.

J. V. MILLS, and
GEO. C. HAZELTON,
Attorneys for

SUPREME COURT U. S.

OCTOBER TERM, 1881.

UNITED STATES OF AMERICA,

vs.

BERNARD EMHOLDT and ELIZA BERGENER.

Certified on Division of Opinion from the Circuit Court for the Western District of Wisconsin, 25th of July, 1879.

The printed transcript in this case shows that H. M. Lewis, Esq., U. S. Attorney for the Western District of Wisconsin, on the 20th January, 1879, filed an 2

information in the said District Court, setting forth that the Deputy Collector of internal revenue within the jurisdiction of said Court, on the 16th January of said year, seized certain real estate, viz.: a lot of ground in La Fayette county, Wisconsin, on which were a stone brewery, barn, dwelling house, corn crib and shed, copper still head and worm, barley malt, corn, oats, distilled spirits, two mules, three horses, three cows,
3 belonging to Severin Schulte and Peter Lauterbach, and other personal property, all found on said lot. See Trans. 1—4.

The information charges Schulte & Lauterbach with having in their possession and control said distilled spirits for the purpose of being sold and removed by them to avoid payment of the tax to which they were subject; that the barley, corn, &c., were intended to be manufactured into distilled spirits to be sold in fraud of the ravenue law; that all of said personal properiy was found in the building aforesaid and yaıds and enclosure
4 connected therewith, in violation of Section 3453 of Rev. Statutes of the United States. Trans. 3—4.

Only personal property is forfeited by a violatlon of the provisions of Section 3453. Mrs. Burgener does not contest the condemnation of the personal property so seized.

Nor will it be necessary to notice the 4th count or specification, which charges Schulte & Lauterbach with neglecting to register their still as required by the 3258 Section, the penalty for such neglect being fine and imprisonment.

The jury before whom the issue was tried in the

District Court, rendered a special verdict, and from the specific facts they have found it must be determined what sections of the Statute have been violated by Schulte & Lauterbach. 5

The 5th and 6th counts in the information charges Schulte & Lauterbach with having neglected various duties imposed by the law on *registered distillers*, which duties are prescribed in Section 3260 and Sections 3303, 3304, 3305 of the Revised Statutes. The offences found in the special verdict are not covered by either of these Sections.

The examination of the special verdict (see Trans. par. 40, 41, 42) will enable the Court to ascertain what Section of the Statute Schulte & Lauterbach are convicted of having violated. The jury "find that Severin Schulte, upon the premises and real estate described in the information * * * from April 1874 to the 28th December, 1875, carried on the business of a distiller in the manner charged in said information, and that he defrauded the United States of the tax on the spirits distilled by him during said time, and that he carried on said distillery business during said time with intent so to defraud the United States of the tax upon the spirits so distilled by him. and that he is guilty of the offences against the revenue laws of the United States charged in the information in that behalf." 6 7

The jury further find that on said 28th December, 1875, Severin Schulte conveyed one-half of the real estate and premises to one Peter Lauterbach and "that thereafter and until the 16th January, 1879, said premises were owned and occupied and the legal title thereof held by the said Severin Schulte and Peter Lauterbach 8

as tenants in common, * * * * * and that from said 28th December, 1875, to said 16th day of January, 1879 (the date of the seizure), said Schulte and said Lauterbach carried on the business of distillers on said premises as charged in said information without giving the bond required by law to be given by them, the said Shulte & Lauterbach, as such distillers and with intent to defraud the United States of the tax on the distilled spirits so manufactured by them, and that
9 they during said time were guilty of the offences charged against them in said information."

The special verdict further finds that on the 22d January, 1878, Peter Lauterbach and wife mortgaged his undivided half of said real estate (the brewery lot) to the claimant, Eliza Bergener, to secure the payment of $2000 and interest and that on the same day Severin Schulte and wife mortgaged his undivided half of said real estate to the claimant, Bernard Emholdt, to secure the payment of $2800 which included a balance due Emholdt from Schulte on a former mortgage dated in 1867. It does not find that either of the mortgagees had knowledge of the illegal distilling of the mortgagors.

10 The only count in the information which alleges offences by the distillers substantially the same as these found by the special verdict is the 7th count (Trans. par. 7, 8, 9), which reads as follows: "That the said distilled spirits and the said stills and other apparatus, the said still and apparatus then and there to-wit.: at the said town of Shullsburg, in the county of La Fayette, in the western district of Wisconsin, on the sixteenth of January, in the year of our Lord One Thousand Eight Hundred Seventy-nine, being fit and intended to be used for the distillation of spirits, were owned by said Severin Schulte and Peter Lauterbach, who then and there

carried on the business of distillers, wholesale liquor dealers, retail dealers in liquors, and rectifiers without having paid the special taxes required by law, and carried on the business of distillers without having given bond as required by law, and engaged in and carried on the business of a distiller with the intent to defraud the United States of the tax on the spirits distilled by them; and that said distilled spirits and personal property were found in the said distillery of the said Severin Schulte and Peter Lauterbach, and in a certain building, room, yard and inclosure connected therewith and used with and constituting a part of the said distillery premises; and that said distillery is situated on said lot and tract of land hereinbefore described; and that the said Severin Schulte and Peter Lauterbach, and a certain person or persons, to said attorney unknown, have a certain right, title and interest therein, and that said person or persons, then and there having certain right, title and interest in said lot or tract of land, did then and there knowingly suffer and permit the said business of a distiller to be there carried on, and did connive at the same, and that said personal property was then and there owned by and in the possession of said Severin Schulte and Peter Lauterbach, who then and there permitted and suffered a certain building, yard and enclosure and a part thereof to be used for the purposes of ingress and egress to and from said distillery and which said personal property was found in said building, yard and enclosure; and that said Severin Schulte and Peter Lauterbach and said person and persons to said attorney unknown, knowingly suffered and permitted said premises, to-wit.: said stone brewery and the building and additions adjoining and appurtenant thereto, and the said lot and tract of land hereinbefore particularly described, to be used for

ingress and egress to and from said distillery, and then
15 and there had certain rights, title and interest in and to said premises, against the 16th Section of the act of Congress entitled, 'An act to amend existing customs and internal revenue laws and for other purposes'— approved February 8th, 1875."

It appears that the foregoing 7th count of the information is drawn up under the act of Congress to which it refers. This act is an amplification of Section 3281 of the Revised Statutes; but so far as the special verdict designates the offences of which Schulte & Lauterbach were gullty, the act of Congress and Section 3281 use precisely the same language.

16 Section 16 of said act of Congress reads as follows:

SECTION 16. That any person who shall carry on the business of a rectifier, wholesale liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquor or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the U. S.
17 of the tax on the spirits distilled by him or any part thereof, shall for every such offense be fined not less than $100 nor more than $5000 and imprisonment not less than 30 days nor more than 2 years. And all distilled spirits or wines and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for compounding of liquors owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard

or enclosure connected therewith and used with or constituting a part of the premises ; and all the right, title and interest of such person in the lot or tract of land in which such distillery is situated and all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard or enclosure or any part thereof to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard or enclosure, and all the right, title and interest of every person in any premises used for ingress or egress to and from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

We now have the act of Congress creating the offences of the distillers, and the special verdict convicting them of said offences, and said act of Congress prescribes the forfeitures to be imposed on them and other persons who may have connived at their unlawful acts.

The answer of Bernard Emholdt setting forth his mortgage given by Schulte & Lauterbach to him for $2800, dated 28th January, 1878, is printed in Trans. par. 14—20.

Eliza Bergener's answer sets forth her mortgage of same date, 28th January, 1878, for $2000. Trans. par. 29—35. Both mortgages embraced the distillery premises.

On the issue joined on these answers tried before the

District Court of the Western District Wisconsin on the
21 7th June, 1879, the jury rendered the special verdict in folios 6—10 of this argument, and see Trans. par. 40, 41, 42.

On the facts found in this special verdict the District Court, on the 25th June, 1879, rendered its judgment declaring said real estate forfeited to the United States, and that said mortgages were no lien or incumbrance thereon as against the United States. Trans. par, 43, 44, &c.

The claimants then appealed to the Circuit Court of the United States, then in session at Madison for said Western District of Wisconsin. Trans. par. 45.

On the hearing before the Circuit Court, his Honor
22 Judge Bunn sitting therein with Justice Harlan, the latter adjudged that the claim of the United States was subject to the mortgages of said claimants, Emholdt and Bergener, upon said real estate. Trans. 46, 47.

The District Judge being of a different opinion, the question was certified to the Supreme Court of the United States. Trans. par. 46, 47.

It was conceded by the attorney for the United States, the special verdict not finding that the claimants knew of or connived at the fraud of the distillers, that if their
23 mortgages had antedated the unlawful distillation, they would have been valid as against the forfeiture; but that they were given 22d January, 1878, while the unlawful distillation was carried on and had been carried on since 1875, and before that time, that therefore said mortgages

were void as against the forfeiture to the United States. Numerous authorities were relied on by the United States' Attorney in the Court below, but all of them were cases arising under statutes which forfeited personal property, and not "the right, title and interest" of the delinquent therein. The case of the United States vs. 24
1960 Bags of Coffee arose under the 5th section of the Non Intercourse Act of March, 1809, 2 Stat. at large 529, which provides "that whenever any article the importation of which is prohibited by this act shall after the 20th May be imported into the United States, or put on board of any ship, &c., with intention of importing the same into the United States, all such articles * * * shall be forfeited" to the U. S.

Coffee was one of the articles prohibited. The claimants bought the coffee, not knowing it had been imported since the passage of the act, and the Supreme 25
Court decided that the doing of the prohibited act extinguished all [redacted] existing titles and interest in the coffee held by all or any persons, and vested the entire right of property in the government, and no transfer or sale thereafter by the delinquent owner could vest any title or right to the coffee in the vendee. That the subsequent judgment of condemnation did not transfer the title to the United States, but established the fact and date of the offence, at which date the coffee became the sole property of the government. And seeopinion 26
of Judge Ballard, District Judge of Ky., U. S. vs. 56 Barrels of Whiskey, seized under 68th Section of the Internal Revenue Act of 1864, 6 Am. Law Regr, New Series (1866–7), 632, &c. All the authorities under similar laws are cited there.

But we must examine the language used in Section 3281 of the Revised Statutes, or its revision in the 16th

Section of the act of Congress, set forth in folios 15—19 of this argument, to discover the character of the forfeitures for its violation. Horses and mules, corn, &c., were seized by Collector Campbell in this case. These
27 belong to a class of property not necessarily used in a distillery, and the officer seized them, because, in the language of the law, "*they were found on the premises.*" Here the title of the United States was vested at the time of the seizure, not before, and had the horses, &c., been off the distillery lot when the officer took possession, they would have been beyond his reach, though these animals might have projected their heads over the fence and inside of the enclosure.

Another clause of the same Section declares, that "all distilled spirits or wines, and all stills * * * * * owned by such person (the fraudulent distiller) wherever
28 found * * * * shall be forfeited to the United States." If the meaning here is the same as the clause of forfeiture in the Non Intercourse Act, the commission

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The cases relied on by the United States apply only
29 to personal property, and to statutes that act upon the *corpus*, the property itself, not on the mere interest of the delinquent owner. The United States Marshall or officer under these statutes can seize the property and retain it, the moment the misdemeanor is perpetrated.

It must be in the possession of the officers of the Court at the time of the condemnation.

Suppose the Section violated by Schulte & Lauterbach had only forfeited " their right, title and interest " to the wines, spirits, stills and other property seized by the Collector. If they had no title to the wines and spirits, if they belonged to other persons before the illegal 30
business commenced, the United States could take nothing under such a Section. If this property was under mortgage for a debt then due or to become due the Collector would be liable to an action of trespass at the suit of the mortgagee if he took it into his possession. The United States, as in the other cases mentioned, would be compelled to accept the interest existing in the mortgagor at the time the Collector could make a legal seizure of the property. If the Collector could not wrest it from the fraudulent distiller even after his offence was known; as the ostensible owner of the property, being 31
in possession, he ought to be allowed to dispose of his interest in the property to innocent parties as any other owner might. The Statute only affecting his right and interest, implies that he may dispose of that interest to innocent persons until the United States asserts its title by taking actual possession.

Before and during the prosecution of his illegal business, the tenant in common of the distiller may have manual possession of the property claimed to be forfeited, or some purchaser may hold it under a conditional sale to be his, when the price is paid, and such 32
purchaser in the mean time could convey a valid title to another vendee. If the government cannot disturb this possession by actual seizure it is estopped to deny the title of an innocent vendee, derived from either the

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28 found * * * * shall be forfeited to the United States." If the meaning here is the same as the clause of forfeiture in the Non Intercourse Act, the commission of the act prohibited, would at the same moment abrogate all existing title in the distillers, then owners and vest it in the United States. If the forfeiture could only attach to property while the distillers are the visible and ostensible owners, the title of the United States would not be effectual as against bona fide sales made by them. The seizure must precede the sale.

Douglas v. Cook
Peach Ford 828

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guilty manufacturer or other party who disposes of his interest in such property (2 Par. Cont. p. 793) and note. The forfeiting clause is not limited to the delinquent's interest at the time of his offence. The government can take his entire interest, whether greater or less, at the time of seizure.

The clause of Section 3281 R. St. U. S. (revised in 16th Section of the Act of Congress set forth in folios
33 15—20) under which the U. S. claims in this case acts upon real estate. It forfeits for certain offences "all right, title and interest of such person (the distiller) in the lot or tract of land on which such distillery is situated, and the right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same." The position assumed by the counsel for the government, is, that all the right, title and interest of Schulte & Lauterback in the premises was forfeited at least as early as 1875, when they were secretly manufacturing whiskey; that they had no interest thereafter in the distillery lot, and consequently the mortgages given by them to Emholdt and Bergener in 1878 are void as against the United States; that this saving clause applies only to mortgages or interests
34 derived in good faith from the manufacturers before they engaged in the illegal business.

We will read the clause with fitting words to express this idea. "And all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same (provided such right, title and interest was acquired before the carrying on of such prohibited manufacture), shall be forfeited to the United States."

The clause thus read would leave the mortgage 35
interests of Emholdt and Mrs. Bergener, acquired *after* the carrying on of the illicit business, untouched and valid against the United States! *Expressio unius est exclusio alterius.* It is a baseless assumption—a begging of the whole question, to contend that this clause in the act does not apply to their mortgages because they were given at a time when the title of the mortgagors as is asserted was forfeited to the United States. The attorney for the United States admitted that the right, title and interest of *all persons ignorant* of the distillers' fraud were exempt from forfeiture under this 36
Section, but he ingeniously deprived Emholdt and Bergener of the benefit of this admission, by asserting the distillers had no title or interest in the real estate when the mortgages were given and therefore their mortgagees could have none. We assert the fraudulent distillers could convey a right, title and interest in the premises when they gave these mortgages, and should not the United States choose to interfere, Emholdt and Bergener could foreclose their mortgages even if they had been *participes criminis*, and could they not 37
have transferred their mortgages to innocent parties? Titles and interest in real estate are liable to continual mutation and change, and it is the clear, common sense meaning of the law that the shifting of titles might go on till the Government should take possession and arrest it. The government and its officers might delay taking possession for many reasons, long after they were aware of the existence of the illegal manufacture, and in the mean time purchases might be made and liens created by the occupants of the premises whose titles of record appeared to be perfect. Suppose a portion of this distillery lot had been sold by Schulte & Lauterbach after their offence and that the grantee

purchasing in ignorance of it, had erected a church, court house, dwelling, or manufacture, upon it; upon the discovery of the offence, could the United States still regard the purchased part as a portion of the distillery premises, and could its officers seize it, the buildings thereon and all the personal property therein, because the title thereto was vested in the United States before the conveyance to such purchaser? A fair construction can be given to the statute which avoids such a fatal consequence—that is, that the "title and interest" is ambulatory and vendible until actual seizure by the United States.

Whence has arisen the notion that interests derived from the delinquent before his guilt are exempt from forfeiture if held by an innocent party, but void if the purchase was made or lien created after the offence? Section 3305—where a registered distiller fails to comply with certain provisions of said Section—declares "that the distillery, distilling apparatus and the lot or tract of land on which it stands, and all the personal property on said premises used in the business there carried on, shall be forfeited to the United States. Here there can be no mistake. The forfeiting clause acts on the "corpus" and extinguishes all pre-existing titles of whatever date, or by whomsoever owned, and renders subsequent claims not derived from the United States legally impossible. But in case of a registered public distillery all persons having an interest or lien in the property are regarded as owners *quo ad hoc*. The lots cannot be used for a distillery without the consent of all parties interested in the title, and they are therefore made equally responsible for any violation of the law. See Section 3262 Rev. St. U. S. When the statute forfeits the "corpus," the real estate itself, we see that

interests anterior to the offence by whomsoever held, instead of being favored in law, are the only interests actually forfeited; subsequent claims are rendered void (not forfeited) in consequence of the anterior and paramount title of the United States. In as much as Section 3281 of the Revised Statutes, which has been violated by Schulte & Lauterbach, exempts from forfeiture titles and interests conveyed by them to parties ignorant of their fraud, the counsel for the government arbitrarily chooses to bestow the benefit of this exemption to interests and mortgages made before the unlawful manufacture was begun, and withhold it from mortgages made afterwards. The statute makes no such distinction, and the counsel for the claimant, Mrs. Bergener, rests her rights upon it.

Section 3260 requires of every person, giving notice of his intention to commence the business of a distiller, to give bond with good security to the United States, that he will not suffer the distillery lot while he carries on the business to be incumbered by mortgage, judgment or other lien. The giving of the mortgage itself is one among several other acts which causes the distiller to forfeit the distillery and real estate connected therewith. He could hardly escape the penalty of the bond by showing the mortgage was void in consequence of some previous violation of other provisions in the Section that divested him of his title. Section 3262 requires the distiller to obtain the consent of all mortgagees whose liens are in existence when the distillery is started. As to mortgages given afterward, whether valid or not against the United States, the Section does not discriminate between those given before and those given after a secret act of forfeiture.

The special verdict does not find that Schulte &

Lauterbach were registered public distillers. The law therefore only touches their " right, title and intesrest " in the distillery lot—otherwise a tenant at will or mere trespasser, running a secret distillery, might cause a forfeiture of land belonging to innocent, unsuspecting persons. Persons having liens on a *public distillery* can protect themselves. See Section 3262.

45 It appears from the transcript that the issue on the information was tried before Honorable Romanzo Bunn, District Judge, presiding alone. Trans. par. 1, &c. See his final judgment, par. 44 of Trans. An appeal was taken by the claimants to the Circuit Court. Trans. par. 45. By consent of parties the appeal was heard before Justice Harlan and the District Judge Bunn. Trans. par. 46, 47, and see Trans. 1st page. The Judges disagreed and the case comes before the Supreme Court on a division of opinion. Trans. par. 47. Should
46 this case have been brought to the Supreme Court by writ of error or appeal and not by a division of opinion? U. S. vs. Lancaster, 5 Wheaton, 434.

This irregularity, if it be one, is not relied on by Mrs. Bergener who desires the litigation to be finally determined at the present hearing.

J. T. MILLS, and
GEO. C. HAZELTON,
Attorneys.

OFFICE SUPREME COURT U.S.
FILED
MAR 21 1882
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES

No. 238.

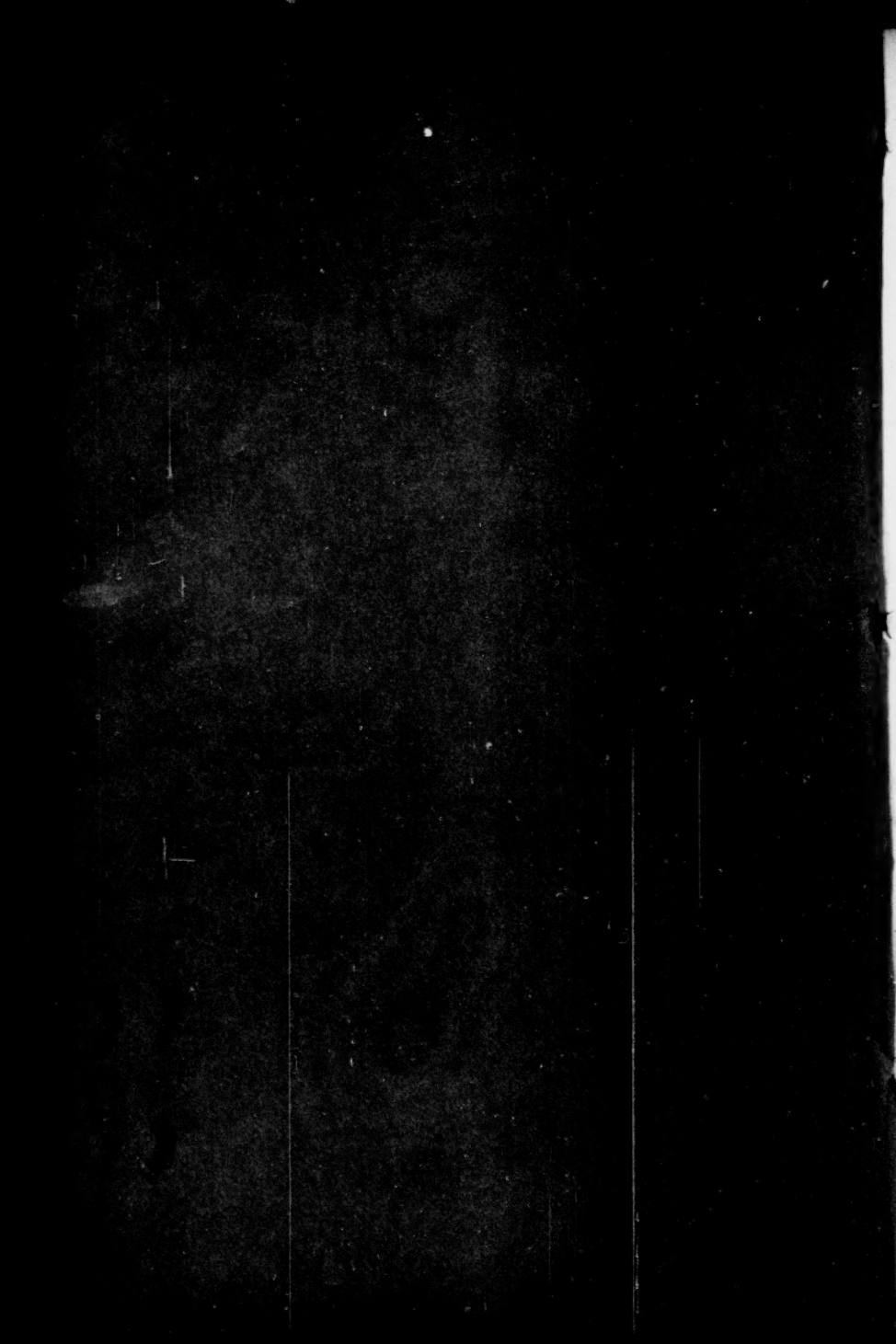
THE UNITED STATES, APPELLANT,

vs.

BERNARD EMHOLT, ET AT., CLAIMANTS, ETC.

BRIEF OF CLAIMANT, BERNARD EMHOLT.

S. U. PINNEY, *Counsel for Claimant*, BERNARD EMHOLT



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BRIEF OF CLAIMANT, BERNARD EMHOLT.

This case comes here by appeal from the circuit court of the United States for the western district of Wisconsin, where it was heard and decided by the Hon. John M. Harlan, circuit justice, and the Hon. R. Bunn, district judge, upon the special verdict found in the district court.

The cause came to the circuit court on appeal from the district court, where it was tried by the Hon. R. Bunn, district judge, and a jury.

The judgment in the district court went for the United States. The judgment in the circuit court went for the claimants. But in the circuit court there was a division of opinion between the judges, the circuit justice holding that the United States was entitled to judgment forfeiting the property described in the information to its use, subject to the mortgage claims of the claimants as set out in their respective answers, which opinion controlled the judgment. The district judge was of the opinion that the claim of the United States was prior to those of the claimants. On this division of opinion the cause is certified here. The information is based on section 3281, R. S., and prays for the forfeiture, with other property therein described, of a stone brewery,

the tract of land upon which it is situated and the appurtenances thereunto belonging, on the ground that upon said premises the owner and owners thereof had carried on the business of a distiller, etc.

It is recited in the special verdict that one Severin Schulte, upon these premises, from April, 1874, to the 28th day of December, 1875, carried on the business of a distiller and defrauded the United States of the tax on spirits distilled by him during said time; that he was the owner of and held legal title to said premises during said time, subject to a mortgage made and executed by him and his wife to the claimant, Emholt, to secure the payment of the sum of three thousand dollars, and which mortgage bears date on the 12th day of August, A. D. 1867, and was recorded in the register of deed's office, La Fayette county, Wisconsin, on the 12th day of February, A. D., 1867. That on the 28th day of December, 1875, the said Schulte sold and conveyed an undivided one-half of said real estate and premises to one Peter Lauderbach, subject to said mortgage, and that thereafter and until the 16th day of January, A. D. 1879, said premises were owned and occupied by them as tenants in common, and that during said time they carried on the business of distillers on said premises without giving the bond required by law to be given by them, and with intent to defraud the United States of the tax on the distilled spirits so manufactured by them. That on the 22d day of January, 1878, said claimant, Emholt, satisfied and discharged of record in said office of register of deeds for La Fayette county, Wisconsin, said mortgage so executed to him as aforesaid on the 12th day of August, 1867; and that on the 22d of January, 1878, said Schulte and wife executed to the said claimant, Emholt, a mortgage conveying his undivided one-half interest in said premiums to secure payment of the sum of twenty-eight hundred dollars, which said mortgage was dated on said 22d day of January, 1878, and recorded in the said register of deed's office on the 28th day of January, 1878, and that said mortgage last mentioned was given to secure part of the indebtedness secured by said mortgage for three thousand dollars, dated on the 12th day of August, 1867.

First. The certificate of division of opinion in this case fails to confer on this court jurisdiction over it. The district judge heard and decided the case in the district court. It was his judgment that was appealed from, reversed and set aside in the circuit court. He was not empowered by law to sit in the case in the circuit court, much less to give an opinion in it there. His opinion in it there must go for naught. There was in that court but one legal opinion and that the one of the circuit justice. The United States v. Lancaster, 5 Wheaton, 434, Desty's Federal Procedure, section

614. The court having failed to acquire jurisdiction of the case cannot consider it and ought to dismiss it of its own motion.

Second. There are but two questions involved in the consideration of this cause on its merits. First. When does the forfeiture declared in section 3281, attach and take effect *i. e.*, at the time the illicit acts are committed or at the time the property is seized?

Second. Did the claimant Emholt, by discharging the mortgage given to him August 12th, 1867, release as against the United States, his lien on the property, or is his mortgage dated, the 22nd day of January, 1878, and which is in fact but a renewal of his first mortgage, to be considered as anything but a continuation of that mortgage?

As to the time that a forfeiture prescribed by statute shall operate and take effect, rules have been established by the decisions of this court which we do not seek to controvert. In the case of Henderson's distilled spirits, 14 Wallace 44, this court held that the forfeiture prescribed by section 3450, R. S., attached at the moment that the wrongful act was done. We take it that this was so decided for the reason that the language of the section passed on clearly expressed the intention of congress to that effect. The late justice Clifford, in delivering the opinion of the court in the case, at page 57, says: "Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the the property as a penalty for a violation of law without giving any alternative remedy or prescribing any substitute for the forfeiture or allowing any exceptions to its enforcement or employing in the enactment any language showing a different interest."

The section construed in this case cited, declared an absolute forfeiture of the property itself and the whole property. It contained no exceptions or or reservations. It provided for the forfeiture of the property, regardless of its ownership. By the prohibitual act the property became tainted beyond a possibility of removal of the taint.

The language of the statute itself clearly expresses the intention of congress, that the rights of innocent as well as guilty persons shall be affected by the forfeiture, and clearly under such a statute the commission of the prohibited act immediately vests the government with the title of the property.

The statute under consideration in the case at bar is widely different. It does not seek to forfeit the property regardless of its ownership. It strikes at the person who commits the offense.

It forfeits only his right, title and interest in and to the property. The act prohibited by this section may be committed upon premises to the title to which the person committing it is a stranger. In which case there is no forfeiture to the government so far as the premises are concerned. There is a clear exception to forfeiture embraced in this section, and to the effect "that all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, ect., shall be forfeited, etc. The premises shall be forfeited except they belong to an innocent person." The statute clearly protects the rights and interests of those who are not *particeps criminis* in the offense. It clearly expresses the intention of congress, to the effect that the rights and interests of none but the guilty shall be prejudiced. The statute does not say at what time this forfeiture shall operate. It does not prescribe whether the right, title or interest, held by the guilty person at the act or acts prohibited were done, or his right, title and interest held and owned by him at the time the property is seized shall be forfeited. It must be so construed as to take his right, title and interest at either one or the other of these periods, and cannot be so construed as to operate at both periods. The statute does not provide that any after acquired interest, right or title shall be forfeited. It is only the right title and interest owned at the time to which the forfeiture relates. Suppose that Schulte committed these prohibited acts only in the year 1875, and during that time occupied these premises as lessee, and afterwards, after he had ceased to defraud the government, he acquired the title in fee to the premises, if the forfeiture relates to the time the prohibited acts are committed nobody could contend that the provisions of the section under consideration work a forfeiture to the government of this after acquired fee title. Such a construction as this might wholly fail to accomplish the objects of the statute. In the instance given, the proceeds of Schulte's ill-gotten gains may have enabled him to acquire the fee title to this property, and yet the government would be powerless to reach it.

It is submitted that the section should be so construed as to protect the interests and rights of the innocent. To hold that the forfeiture relates to the time that the prohibited acts are committed, strikes at the guiltless indiscriminately with the guilty. It puts a bona fide purchaser for value upon no better footing than the criminal himself. To hold that the forfeiture relates to the time of seizure is to carry out the clear intention of congress and to inflict a punishment upon no one but him who has merited it. It is difficult to see wherein a person who in good faith buys for value real estate upon which these prohibited acts have been committed after they have been committed, and before it is seized, stands in a more criminal light than a person who being innocent

of any offense against the government owns the premises at the time that the offense is committed. The statute itself makes no distinction between the two. From its language cannot be drawn the inference that a discrimination is intended to be made against the bona fide purchaser for value; such a discrimination would be invidious. It might be said that the landlord upon whose premises his tenant carried on the business of a distiller in a manner to defraud the government, although such landlord might be ignorant of the fact, was not free from constructive guilt; it might be said that it was the duty of the landlord to see to it that his premises were not made use of to defraud the government, while no guilt, either actual or constructive, could be charged against the *bona fide* purchaser for value.

As before stated, congress clearly intended to affect by the provisions of this section only the rights and property of the guilty, and from this expressed intention is deducible the intention that the forfeiture should not take effect until the time of seizure, and that the right, title and interest named in the statute relates to the right, title and interest of the guilty person at the time of seizure. We think that the language of the late Mr. Justice Clifford, above recited, sustains us in this position.

It has been decided that the forfeiture prescribed by this section relates to time of seizure:

United States v. Feigelstoch, 14 Blatchford C. C. Reps., 321.

United States v. 372 Pipes of Distilled Spirits, 5 Sawyer, 421.

Then, regarding the case as though the defendant, Emhold, owned or acquired no interest in these premises until tho 22d day of January, 1878, his interest then acquired cannot be divested by judgments herein.

As to the second question involved:

If it be held that the forfeiture declared by the section under consideration relates back to the time of the commission of the prohibited act or acts, it is not apparent wherein the claim of the government to the property in question is stengthened or against the claimant, Emholt. The first prohibited act was committed upon the premises in controversy in April, 1874. At that time Schulte owned them, and Emholt held a mortgage upon them to secure the payment of the sum of $3,000. Emholt was guiltless of any offense against the revenue laws. It is not pretended that his mortgage rights under this mortgage became vested in the government; and had this mortgage not been cancelled of

record, it is not claimed but that it would to-day be prior to the title of the United States.

It is not claimed but that the only title which enured to the government by the commission of the prohibited acts was that of Shulte as it stood then. But it is claimed that at the moment the acts complained of were committed, the legal title to the premises, it then being in Shulte, vested in the United States, and that the release of Emholdt's mortgage wiped out the mortgage title and vested a perfect, indefeasible title in the government. This section forfeits all the right, title and interest of the guilty party, whatever be the title of the guilty party that passes out of him and vests in the United States. It makes no difference what it is. It may be the legal title; it may be an equitable title or right or interest, and nothing more. Whatever it is, it goes to the government, and whatever right, title or interest, whether it be legal or equitable, belongs to a person guiltless of any offense against the revenue laws, still remains in such person unaffected. This right, title or interest is and must be determined by a suit on the part of the government against the property itself. In such suit, if the title of the guilty person be an equitable title, it is declared to be forfeited to the government, the rules of equity would be applied in reaching this result. Suppose in the case at bar, Shulte had been mortgagee at the time the prohibited acts had been committed by him, and Emholt owner of the premises, his mortgage interest would be vested in the government. Suppose that afterwards, Embolt paid off this mortgage and procured a release and discharge of same of record. In a suit to recover the mortgage interest under the section in question, the court could declare the release and discharge of the mortgage to be set aside and annulled and the mortgage restored. Then this must be a suit in equity.

In case of United States vs. 372 Pipes of Distilled Spirits, *supra*, the court declared a bill of sale to be a mortgage. In that case the government under an information based on section 3281, asked for the forfeiture of property upon which a claimant held a bill of sale. It appeared in the case that it was given as security for money advanced. The court held that the claimant was interested in the property only to the amount for which he held it as security. In equity, the rights of Emholt would not be at all disturbed by the exchange of the first mortgage for the second, both being for the same debt. We need to cite no authority to this proposition, it is too well settled to admit of dispute. No lien can intervene between the satisfaction of the first mortgage, and the record of the second, the last being but a renewal of the first, where both transactions are committed on the same day.

Bruse vs. Nelson, et al., 35 Iowa, 157.
Shaver vs. Williams, 87 Ill., 469.

This rule should be rigidly enforced to prevent a forfeiture. It may be questionable whether it would not be applied were this purely an action at law. We submit that the forfeiture declared by section 3281, R. S., upon which the information in this case is based, does not attach until the property is seized, and reaches only the right, title and interest which the guilty party has in it then, and that even though it could be held that it related back to the time of the commision of the prohibited act or acts, still it cannot be enforced except subject to the mortgage lien of the claimant Emholt.

S. U. PINNEY,

Counsel for Claimant, BERNARD EMHOLT